UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGE OF MARIA FRANCO	)	
UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	CASE NO. 92B00278
FRANK'S MEAT COMPANY A SOLE PROPRIETORSHIP, Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
AND LIFTING STAY ORDER

I. *Procedural Background*

On February 25, 1993 Respondent, pursuant to Rule 12 of the Federal Rules of Civil Procedure, filed a Motion to Dismiss the complaint. Respondent argues that I do not have jurisdiction over the subject matter of the complaint because the Office of Special Counsel (OSC) failed to give notice to Respondent of the charging party's discrimination charge against Respondent within ten days after its filing with OSC as required by 8 U.S.C. § 1324b(b)(l).

Respondent also argues that the Complaint should be dismissed because Complainant has not established that the charging party, Maria Franco (Franco), is a "protected individual" as defined by 8 U.S.C. § 1324b(a)(3) which is a prerequisite to stating a claim under the statute. Respondent has not submitted any affidavits or other documentary evidence in support of its motion.

On the same date that Respondent filed its motion to dismiss the complaint, Respondent also filed a motion to quash notices of the depositions of three individuals and for a protective order. On

February 25, 193, I granted the motion to quash and stayed discovery until I had ruled on the motion to dismiss.

On March 15, 193, Complainant filed its' opposition to Respondent's motion to dismiss. Complainant did not attach any affidavits or other documents in support of its response to the motion to dismiss. On March 29, 193, Respondent filed a response to the Complainant's opposition. On April 15, 193, Complainant filed its Reply to Respondent's Response attaching a number of letters thereto. For the following reasons, Respondent's motion to dismiss the complaint will be DENIED.

II. *Legal Analysis*

A. Rule 12(b)(1) of the Federal Rules of Civil Procedure will be used as a guideline to determine the merits of Respondent's motion to dismiss.

Respondent filed its Motion to Dismiss the Complaint arguing that I do not have subject matter jurisdiction and the complainant has failed to state a claim upon which relief can be granted. See Respondent's Motion to Dismiss, para. 1-2.

The regulations that govern the rules of practice in this proceeding are set forth at 28 C.F.R. §§ 68.1-68.54. These regulations state that the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1.

The regulations do provide that an Administrative Law Judge (ALJ) may dismiss a complaint if he finds that the complaint fails to state a claim upon which relief can be granted. 28 C.F.R. § 68.10. The regu-lations also provide for the filing of other types of motions but does not specify the specific motions that may be filed. 28 C.F.R. § 68.11. Although Respondent's motion asserts that the complaint should be dismissed because it fails to state a claim, I view both of Respondent's reasons for arguing that the complaint should be dismissed as jurisdictional arguments. Moreover, it is my view that Respondent's motion is similar to a motion to dismiss for lack of jurisdiction over the subject matter under Rule 12(b)(1) of the Federal Rules of Civil Procedure. I will therefore rely on Rule 12 and the federal case law

interpreting its applicable sections for guidance in determining how to resolve Respondent's motion to dismiss.

The purpose of Rule 12 is to "expedite and simplify the pretrial phase of litigation while at the same time promoting the just disposition of cases." 5A C. Wright and Miller, Federal Practice and Procedure, § 1342 at 161 (1990). OCAHO's Regulations, 28 C.F.R. §§ 68.10 and 68.11, have the same objective with regard to the prehearing phase of litigation.

Fed. R. Civ. P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction whereas Rules 12(b)(6) and 12(c) govern motions to dismiss for failure to state a claim upon which relief can be granted. Rule 12 requires that rule 56 standards be applied to motions to dismiss for failure to state a claim under rule 12(b)(6) when the court considers matters outside the pleadings. See Mortensen v, First Sav. and Loan Ass'n., 549 F.2d 884, 891 (3rd Cir. 1977) (Motion under rule 12(b)(6) raising matters outside the pleadings is converted to a Rule 56 motion). Rule 12 does not prescribe summary judgment treatment, however, for 12(b)(1) challenges to subject matter jurisdiction where a factual record is developed. Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). Nevertheless, some courts have held that Rule 56 governs a 12(b)(1)motion when the court looks beyond the complaint. In Re Swine Flu Immunization Prod. Liab. Litig., 880 F.2d 1439, 1442-43 (D.C. Cir. 1989); In Re Swine Flu Prod. Liab. Litig., 746 F.2d 637, 642 (9th Cir. 1985).

I have previously stated that I agree with the majority of circuits that have held to the contrary. See Lardy et al. v. United Airlines, Inc., OCAHO Case No. 92B00085, (Order Granting Partial Lifting of Discovery Stay and Denying Complainant's Motion For Protective Order and Respondent's Motion to Strike Declarations (9/3/92) at p. 5 citing to Mortensen, at 891 (disputed issues of material fact will not prevent trial judge from deciding for itself merits of jurisdictional claims); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.)(district court has power to decide disputed factual issues in a motion under Rule 12(b)(1); cert. denied, 454 U.S. 897 (1981); Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986) (jurisdictional issue must be resolved before trial); Wheeler v. Main Hurdman, 825 F.2d 257, 259 (10th Cir.)(as a general rule, 12(b)(1) motion may not be converted to one for summary judgment), cert. denied, 484 U.S. 986 (1987).

In contrast to a Rule 12(b)(6) motion, a rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or other evidence properly before the court. See Thornhill Publishing Co. v. General Tel. and Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). The party opposing the motion then must present affidavits or any other evidence needed to satisfy its burden of establishing that the court, in fact, has subject matter jurisdiction. St. Clair v. City of Chico, 880 F.2d 199, 200-201 (9th Cir. 1989), cert. denied, 493 U.S. 993 (1989). The district court does not abuse its discretion by looking to this extra-pleading material in deciding the issue even if it becomes necessary to resolve factual disputes. Id. at 201.

B. Failure to provide notice of the charge, within ten days to Respondent, as required by 8 U.S.C. § 1324b(1) is not alone sufficient grounds for dismissal of the complaint.

After carefully reviewing the pleadings, I find that there is no dispute between the parties with respect to the material facts involved in the failure to give Respondent notice of the complaint of the charging party within ten days after filing with OSC. I therefore do not need to obtain any additional evidence to resolve the issue of whether the complaint should be dismissed because of the late notice.

The Complainant's version of the relevant facts set forth in its opposition pleading states that on August 25, 1992, Franco submitted a completed charge of discrimination against Respondent with OSC. Complainant further states that on September 4, 1992, OSC attempted to mail a 10-day notice letter to Respondent. Inadvertently, through administrative staff error, Respondent's 10-day letter was placed in an envelope addressed to another Respondent. When the letter was returned, on September 15, 1992, OSC realized its mistake and immediately mailed the notice to respondent.[1]

Respondent states that on the date it received notice and the next day, it telephonically contacted OSC's office and spoke with Rose A.

[1] Both parties agree that the notice letter was mailed to Respondent's correct address on September 15, 1992, and that Respondent did not receive the notice letter until September 21, 1992. This notice advised Respondent of the discrimination charge filed by Franco and requested Respondent, in lieu of OCS issuing a subpoena, to voluntarily provide to Complainant by September 25, 1992, specified information and/or documents relating to inter alia the discharge of Franco.

Briceno to determine why Respondent was given only three days in which to respond to a list of fourteen specific and detailed questions and requests for documents. Respondent also wanted to know when the notice had been sent by OSC to Respondent. According to Respondent's pleadings, Ms. Briceno told Respondent that the notice was sent only a few days before and the reason for the delay in receipt was because OSC had received an incorrect address from the charging party and after the letter was returned, government counsel obtained the correct address and mailed the notice to Respondent. According to Respondent, Briceno also told Respondent that there "is a rule of law that allows Respondent an extension of the ten day notice period if an address error is made."

Although OSC's notice gave Respondent only four days or on September 25, to respond with OSC's request for specified information and documents, OSC's counsel did on September 25 or 26 agree that Respondent would be given a twelve day extension to respond to the notice.[2] In spite of the extension, Respondent needed only two days to prepare a response and mailed it on September 23, 1992. Respondent's response to OSC's letter and requested information consisted of a three page letter with four attachments.

Complainant concedes that Respondent did not receive notice of the charge within 10 days after the charge was filed with OSC but states that because OSC made a good faith effort to comply with the notice requirements of the statute and further because Respondent has not shown any clear evidence of prejudice that the failure to provide timely notice should not be a bar to bringing the charges in this case.

Respondent argues that Complainant did not act in "good faith" because the reasons given telephonically by OSC for sending the notice letter late are "contrary" to the reasons articulated in the Complainant's opposition. Moreover, Respondent argues that Complainant's defense is that "it did not timely notify Respondent because its office management and manner of assuring that such strict procedural rules are followed is apparently unsupervised and inadequate" which is not a sufficient legal reason to overcome the strict time requirements of notice. Respondent, in effect, argues that mismanagement by OSC in not mailing the notice earlier, is not a sufficient reason for finding that OSC acted in "good faith"; therefore Respondent argues it does not not

[2] Complainant, as a matter of practice and policy, grants extensions of response deadlines, when equity and fairness so dictate.

have to show it has been prejudiced in order to have its motion to dismiss granted.

Respondent also argues that it has been prejudiced by the failure to receive a timely notice because it did not have sufficient time to provide exculpatory information to OSC for the purpose of conciliation and avoiding the filing of a complaint. As a result, a complaint was filed and Respondent has incurred and will continue to incur substantial costs. Respondent cites to EEOC v. Sears, Roebuck and Co., 490 F.Supp. 1245 (M.D. Ala. 1980) and to EEOC v. Container Corp. of America, 352 F.Supp. 262 (M.D. Fla. 1972) in support of its argument that OSC's failure to send a timely letter deprives the court of subject matter jurisdiction. For the reasons stated below, I do not find Respondent's arguments and the cases cited in support thereof persuasive nor controlling.

There are no OCAHO ALJ decisions that have dealt with the issue of whether a complaint charging discrimination under 8 U.S.C. § 1324b should be dismissed because OSC did not provide a timely notice to the employer of the charges filed with it by a former employee. There are however federal court decisions that are helpful and provide guidance on how to decide the issue before me.

The Supreme Court in the case of Brock v. Pierce County, 476 U.S. 253 (1986), rejected the argument that courts should interpret agency statutory deadlines as a statute of limitations or jurisdictional bar. In Brock, the Secretary of Labor failed to issue a final determination within the statutory period of 120 days. The respondent argued that since the statute mandated that the Secretary "shall" make a determination within the statutory period, the Secretary was barred from any enforcement action against the Respondent where it failed to make a determination and Respondent had suffered prejudice. Holding that every failure of an agency to observe a procedural requirement does not void subsequent agency action, especially when important public rights are at stake, Id. at 260, the Supreme Court reversed the district court's decision, and stated that: [T]he mere use of the word 'shall'..., standing alone, is not enough to remove the Secretary's power to act after 120 days." Id. at 262.

In explaining its decision, the Court pointed out that neither the legislative history of the statute nor the language of the regulations supported Respondent's contention that the 120 day deadline was created to be a jurisdictional limitation on agency action.

Applying the Supreme Court's view of agency's statutory deadlines to this case, I find that the 10 day notice rule under 8 U.S.C. § 1324b(b)(1) is not a statute of limitation or a jurisdictional bar. In order to determine the legal effect of a notice given beyond the 10 day rule, I find federal decisions interpreting similar notice rules in Title VII cases helpful.

In EEOC v. Airguide Corporation, 539 F.2d 1038 (5th Cir. 1976) plaintiff appealed from the district court's granting of defendant's motion for summary decision and the consequent dismissal with prejudice of an Equal Employment Opportunity Commission (EEOC) suit pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C.§ 2000e-5(f)(1).

The facts in the Airguide Corporation case show that on October 24, 1972, a non-Spanish surnamed female filed a charge with EEOC, alleging that Airguide Corporation discriminated against her because of her sex and national origin. Pursuant to § 2000e-5(b), the EEOC allegedly sent to Airguide a notice of the charge within ten days of the filing of the charge with EEOC. Airguide claimed it did not receive notice of the charge until August 1973, when it received a letter from an EEOC investigator requesting information regarding the charge.

After conducting an evidentiary hearing, the district court held that there was persuasive evidence that the notice of the filing of a charge within ten days from after October 24, 1972, addressed to Airguide, Inc., was actually mailed.[3] The court, however, also held that evidence of the actual mailing only creates a rebuttal presumption that it was received. The district court concluded that from all the evidence the notice was not received by the defendant until on or about August 7, 1973. Pursuant to this finding, the district court concluded that a condition precedent to suit had not been complied with and that such noncompliance prejudiced defendant. The Court of Appeals, however, reversed and remanded the case for further proceedings.

The Court of Appeals did not "think that Congress intended to prevent the Commission from suing because of an unintentional defect in compliance, without a showing that such 'noncompliance' has caused prejudice to the defendant-employer." The Court further

[3] Apparently for some inexplicable reason Airguide did not receive the notice at or near the date of the mailing.

stated that this was especially true in the case before it because the "noncompliance was actually compliance rendered ineffective by unforeseeable and uncontrollable circumstances." The Court, however, remanded the case to the district court for "a determination of the extent of prejudice, if any, suffered by Airguide because of lack of receipt of timely notice of the charge of discrimination."

EEOC v. Magnolia Electric Power Assoc., 635 F.2d 375 (5th Cir. 1981), reaffirmed the holding in Airguide, supra, Respondent moved to dismiss for lack of subject matter jurisdiction on the basis that EEOC failed to meet the jurisdictional prerequisites to file suit since it failed to notify, investigate, make a reasonable cause determination and conciliate[4] with two of the three respondents named in the charge. While the court stated that a federal agency is bound to pursue a good faith effort in following its administrative procedures, it held that the burden of showing prejudice, sufficient to divest a court of jurisdiction, is upon the respondent. Id. at 378-379.

The court referred to the Airguide decision stating at 378 that:

> When the EEOC ignores, fails to obey or capriciously deprives a respondent of its administrative procedures, no suit may be prosecuted against that respondent regardless of prejudice. On the other hand, when the EEOC 'makes every attempt to comply' with those procedures and there 'has been virtual compliance with all the statutory procedural steps' and where the defect in compliance is unintentional or actual compliance is rendered ineffective by unforeseeable and uncontrollable circumstances, then the EEOC will be barred from prosecuting its suit only upon a clear showing of substantial prejudice to the respondent.

Respondent's reliance on Sears, Roebuck and Co., supra, to argue that Complainant's failure to send a timely letter deprives this agency of subject matter jurisdiction, is misplaced. The Sears case involved a suit by EEOC against Sears. The charge named, and notice of the charge was served upon, the Sears facility in Chicago, Illinois. When EEOC attempted to bring suit against Sears' facility in Montgomery, Alabama, the Montgomery store moved to dismiss the suit against it, on the basis that EEOC failed to serve notice of the charge upon it and failed to include it in its conciliation process. Citing Airguide as the law in the Fifth Circuit, the court in Sears, Roebuck stated "that the

[4] The Office of Special Counsel is not statutorily mandated to conciliate, merely to investigate and determine whether there is reasonable cause to believe that an act of discrimination has occurred and if reasonable cause is found to exist, to bring suit. 8 U.S.C. § 1324b(d)(1).

failure of EEOC to comply with statutory prerequisites will not require dismissal when (1) the EEOC made 'every attempt to comply with the conditions precedent to suit required required under Section 2000e-5 and (2) the technical defect infects no significant injury on the party entitled to observance of the rule.'" Id. at 1254 n. 17.

The other case cited by Respondent in support of its argument, EEOC v. Container Corp. of America, supra, is inapposite for the reasons stated in Complainant's reply brief at pages 6 and 7.

In the case at bar, Complainant did not fail to notify Respondent of the charge. Complainant promptly attempted to mail a notice letter within the 10 day deadline. However, through inadvertent administrative staff error, Respondent's notice letter was placed in an envelope addressed to another respondent. When the letter was returned, Complainant realized the error and immediately corrected the situation by resending the letter to Respondent at the correct address. Respondent received the letter on September 21, 1993.

Although the notice of the charge was not received by Respondent until September 21, 1992, seventeen (17) days after it should have been received, I find that OSC's failure to deliver the notice within the 10 days, whether because of using the wrong address or using the wrong envelope, was inadvertent and was not foreseeable by government counsel. I also do not find that Respondent was prejudiced by the failure to receive a timely notice as more fully explained below.

Respondent argues that it was prejudiced because it did not have sufficient time to investigate the charges, provide exculpatory information to OSC and have an opportunity to conciliate the matter with OSC and avoid the filing of a complaint. If the letter had been received on September 5, 1992, which was within ten days of the filing, the Respondent would have had twenty days to respond to the requests.

Respondent also argues that it was prejudiced because it was "unable to obtain counsel in time to timely respond to the numerous requests for documents and sent their own response without benefit of counsel to represent them in the investigative process...."

There is nothing in the record to suggest that Respondent was not given ample opportunity to obtain counsel. As Complainant states in its reply brief at p. 10 "if Respondent wanted to obtain counsel it had

more than enough time to do so. Respondent never indicated it either wanted to or had any intention of obtaining counsel until Complainant informed Respondent that suit would be filed unless it agreed to settle pre-complaint." After receipt of Complainant's demand letter on November 16, 1992, Respondent obtained counsel and counsel called OSC and obtained an extension of time to consider a settlement offer. I do not find from this undisputed evidence that Respondent was prevented from obtaining counsel nor prejudiced by the manner in which OSC conducted its pre-complaint investigation.

Respondent's argument that it was prejudiced because it did not have an opportunity for conciliation is defective on several grounds. First of all, the Office of Special Counsel is not statutorily mandated to conciliate, merely to investigate and determine whether there is reasonable cause to believe that an act of discrimination has occurred and if reasonable cause is found to exist, to bring suit. 8 U.S.C. § 1324b(d)(l). Although there is mandatory conciliation provision under Title VII [42 U.S.C. § 2000e-5(f)(l)], Complainant is correct in arguing that there is no such right under IRCA.

I have also carefully read OSC's notice letter of September 3, 1992, which has 14 information and/or document requests, including a request for the description of the organization of the company and the number of persons employed by the Respondent on February 23, 1990, and the reasons why Franco was discharged. I do not find that the questions or documents sought by OSC required were so unusually complex or difficult to answer that Respondent could not have responded to most of the more important and mitigating answers within 12 days. Moreover, there was nothing complicated about the allegations of this charge that would have prevented Respondent from presenting to OSC's within the 12 days period its side of the case in an effort to reach a conciliation and avoid the filing of a complaint. If Respondent had received the notice letter on September 5, which was within the ten days of the date the complaint was filed, it would have had only twenty days to respond.

Respondent also had the option of requesting a subpoena from OSC before providing the documents requested by OSC. If Respondent objected to the time that the subpoena set for compliance, Respondent had the further option of filing a motion to quash and/or request more time to respond. Respondent did not choose to exercise either of these options.

Finally, Respondent alleges that it was also prejudiced by the minimal details of the charge provided by the notice. The notice reads in pertinent part:

> "The charge alleges that on February 23, 1990, the injured party was constructively discharged when Frank's Meat Company demanded to see her "green card."

The paragraph clearly gives respondent adequate notice of the charge. Moreover, Respondent's September 23, 1992, response, telephone conversations between Complainant and Respondent on October 16, 1992, as well as its counsel's December 2, 1992 letter, show that Respondent had a clear understanding of the charge allegations. Respondent has failed to explain how the alleged lack of detail on the nature of the charge in a ten day notice letter has prejudiced it.

Finally, prior OCAHO ALJ decision have held similar 10 day notice letter descriptions sufficient to satisfy the requirements of IRCA as set forth at 8 U.S.C. § 1324b(b)(l). See In re Investigation of Florida Rural Legal Services v. Immokaleee Agricultural Workers, 3 OCAHO 437 (6/15/92).

For the foregoing reasons, I do not find that Respondent was prejudiced by receiving the notice letter on September 21, 1992, and I therefore deny Respondent's motion to dismiss the complaint based upon the failure of OSC to deliver notice of the charge within the 10 days after receipt of the charge.

C. Respondent has not submitted sufficient evidence to show that the charging party is not a "protected individual."

Respondent argues that the Complaint should be dismissed because Complainant has not established that the charging party, Franco, is a protected individual as defined by 8 U.S.C. § 1324b(a)(3) which is a prerequisite to stating a claim under the statute. 8 U.S.C. § 1324b(a)(1)(B).

Respondent has not submitted any affidavits or documents to support its position that Franco was not a "protected individual" but rather states facts in its motion relating to information Franco provided or failed to provide to Respondent at the time she was asked to complete the Employment Verification Form (Form I-9) that it believes suggest Franco may not have been a protected individual at the time she applied for work with Respondent. This is not sufficient

evidence to support a finding that Franco was not a protected individual because it is speculative and conclusory. This evidence may, however, provide Respondent with information to make appropriate inquiry during discovery or at hearing as to the protected status of Franco.

Complainant is correct in stating that "when considering whether to grant a Motion to Dismiss for Failure to state a Claim a court must presume all factual allegations of the Complaint to be true and draw all reasonable inferences in favor of the complaining party." citing to 2A J. Moore, J.D. Lucas and G. Grotheer, Moore's Federal Practice, § 12.07 [2-5] (2d ed. 1990). The complaint in this case alleges that Franco was a "protected individual", a defined by 8 U.S.C. § 1324b(a)(3), and an alien authorized to work in the United States. See Complaint at para. 5.

Complainant's response states that "OSC requested that the INS conduct an alien status check of the charging party's immigration status." Complainant further states that "an alien status check of the charging party indicates that the charging party was work-authorized on the day of the act of discrimination and is work authorized to date." Complainant further states that "representative of OSC personally examined the charging party's documents and they are valid evidence of work authorization."

Since Respondent has not provided any affidavits or documents or other reliable evidence to support a finding that Franco was not a "protected individual" as defined by 8 U.S.C. § 1324b(a)(3) and entitled to a judgment as a matter of law, Respondent's motion to dismiss the complaint for failure of Complainant to prove Franco is a "protected individual" is denied.[5]

Accordingly, it is hereby ORDERED and decided that:

1. Respondent's motion to dismiss the complaint is DENIED.

[5] After conducting discovery, if Respondent obtains evidence that conflicts with the government's evidence showing that Maria Franco is not a protected individual, this matter can be resolved at an evidentiary hearing. The best evidence of whether Franco was a "protected individual" may have to be determined from examination of the appropriate Immigration and Naturalization Office's records. See Dhillon v. The Regents of the University of California, OCAHO Case #92B00097 (3/10/93)

2. My prior order dated February 25, 193 staying discovery is hereby lifted and the witnesses Frank Hamlin, Virginia Hamlin and Maggie Gallegos shall be deposed by Complainant at a time and place mutually convenient to the parties but no later than May 28, 193. The prior service of the subpoenas on the Frank and Virginia Hamlin and Maggie Gallegos shall serve as an appropriate service of process with the exception of the date and time as specified herein. If the parties cannot agree on a mutually satisfactory time for the taking of these depositions, government counsel shall file a motion with this office on or before May 3, 193, seeking appropriate relief.

3. It is further ordered that all other prior discovery requests made by Complainant, including interrogatories and request for Production of Documents shall be complied with by Respondent on or before May 17, 193.

4. My order of February 23, 193 setting this case for an evidentiary hearing on June 28, 193 shall remain in effect depending upon the filing of a motion for summary decision by either party and courtroom availability.

SO ORDERED this 23rd day of April, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge